No. _____

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1993

SOUTHERN HEALTH CORPORATION OF HAMILTON, INC., A GEORGIA CORPORATION, QUALIFIED TO DO BUSINESS IN ALABAMA; FRANK JENKINS, M.D., AN INDIVIDUAL; NILES B. FLOYD, AN INDIVIDUAL,

Petitioners,

v.

THOMAS A. LORANCE, M.D.,

Respondent.

On A Petition For A Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court's re-interpretation of "involving commerce" for purposes of Section 2 of the Federal Arbitration Act, to apply only to transactions where the parties subjectively "contemplated substantial interstate activity" – a restrictive reading avowedly adopted in order to promote the state's own anti-arbitration policy – is inconsistent with the intent of Congress as interpreted by this Court and the Federal Courts of Appeals.

2. Whether "involving commerce" in Section 2 of the Federal Arbitration Act should be interpreted to exploit the full reach of the Commerce Clause, rather than be given the restrictive scope specially created for the Federal Act by the Alabama Supreme Court.

3. Whether the Alabama Supreme Court's restrictive re-interpretation of Section 2 wrongly makes the Federal Arbitration Act inapplicable to a wide variety of transactions intended to be covered, thereby threatening to marginalize the important body of federal substantive and procedural FAA law developed by this Court over the past several decades – by shrinking the number and kind of cases to which it would apply.

LIST OF PARTIES

Petitioner, Southern Health Corporation of Hamilton, Inc., is a Georgia corporation with its corporate offices in Atlanta, Georgia.

Parent Company of Southern Health Corporation of Hamilton, Inc.:

Southern Health Corporation

Subsidiaries and Affiliates of Southern Health Corporation:

MCE-Hospital Company

Southern Health Corporation of Hamilton, Inc.

Southern Health Corporation of Hamilton, Inc. d/b/a Marion County General Hospital

Southern Health Corporation of Houston, Inc. d/b/a Trace Regional Hospital

Southern Health Corporation of Calhoun City, Inc.

Southern Health Corporation of Ellijay, Inc. d/b/a/ North Georgia Medical Center

Southern Health Corporation of Red Bay, Inc.

MCE-Houston Properties, Inc.

North Georgia Medical Group, Inc.

Southern IPL, Inc.

Southern Health Management Company

Southern Health Corporation of Jasper, Inc.

Pickens Health Care Association, Inc. d/b/a Mountainside Medical Center & Nursing Home

Southern Health – Pyramed, Inc.

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* Much of the argument and citations of law contained within this Petition for Writ of Certiorari has been taken from a Petition for Writ of Certiorari filed in this Court by Home Buyers Warranty Corporation II and National Home Insurance Company as Petitioners in Case Number: 93-995. The Petitioners in Case Number: 93-995, by and through counsel, have expressly agreed to allow the Petitioners to this Petition to utilize portions of their research analysis and citation of authorities in support of this petition as the questions presented in Case No. 93-995 are mirrored in this action.

No. _____

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SOUTHERN HEALTH CORPORATION OF HAMILTON, INC., A GEORGIA CORPORATION, QUALIFIED TO DO BUSINESS IN ALABAMA; FRANK JENKINS, M.D., AN INDIVIDUAL; NILES B. FLOYD, AN INDIVIDUAL,

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PETITION FOR A WRIT OF CERTIORARI

Southern Health Corporation of Hamilton, Inc. (hereinafter referred to as "SHCH") and Frank Jenkins, M.D. (hereinafter referred to as "Jenkins") and Niles B. Floyd (hereinafter referred to as "Floyd") respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Alabama Supreme Court, not yet reported, is reproduced in the Appendix at App. 1-8. The opinion of the Circuit Court of Marion County, Alabama, likewise, is not reported but is reproduced in the App. 9-11.

JURISDICTION

The opinion of the Alabama Supreme Court was released on February 11, 1994. (App. 1-8) This Court has jurisdiction to consider this petition under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The federal constitutional provisions involved are the Commerce Clause of Article I, Section 8, and the Supremacy Clause of Article VI. The statutory provisions involved are Sections 1 and 2 of the Federal Arbitration Act, 9 U.S.C. Sections 1 and 2, and Section 8-1-41(3) of the *Code of Alabama 1975*, as amended.

STATEMENT OF THE CASE

During the relevant time frames in question, calendar years 1992 and 1993, Petitioner SHCH and/or related affiliates, owned and operated Marion County General Hospital (hereinafter referred to as "Marion General"). SHCH is a Georgia corporation with its offices and place

of business at 5605 Glenridge Drive, Suite 960, Atlanta, Georgia. The officers and directors of SHCH with whom Dr. Lorance dealt during the negotiation, execution and term of the employment contract in question reside and work in Atlanta, Georgia, at SHCH corporate headquarters.

As a part of SHCH's efforts to recruit doctors throughout the United States to contract for services at Marion General Hospital, negotiations were commenced with Respondent Thomas A. Lorance, M.D. (hereinafter referred to as "Lorance"). Lorance was a resident of California and practicing medicine in California at the time that the negotiations for an employment contract between SHCH in Atlanta and Lorance in California began in 1992.

Negotiations between SHCH in Atlanta, Georgia, and Lorance in California commenced in 1992. At that time, negotiations for a net income guarantee agreement were conducted on behalf of SHCH by its agents, all of whom are Georgia residents who performed the negotiations from their offices in Atlanta, Georgia. Jenkins, Mike Hall, Susan Jennings and Philip Eastman participated in the negotiations from Georgia with Lorance while he was still residing in California. The affidavits of Jenkins and Philip Eastman were presented to the Alabama Supreme Court in support of SHCH's objection to Lorance's Petition for Extraordinary Writ of Mandamus. The affidavits are attached hereto as App. 12-22 and 23-28.

Throughout these negotiations and the subsequent performance conducted pursuant to the requirements of the net income guaranty contract, SHCH continued to

perform the majority of its obligations under the contract from its offices in Atlanta, Georgia. The net income guaranty agreement that was ultimately executed by SHCH and Lorance is attached hereto as App. 29-41. The Net Guaranty Agreement (hereinafter referred to as the "agreement") specified that Lorance will receive a specific guaranteed income amount for a time certain in consideration for Lorance providing the medical services and efforts required as per the agreement. In addition to providing the guaranteed income, SHCH contracted to assist Lorance in the marketing and establishment of his practice. SHCH complied with these contractual obligations from its Atlanta, Georgia offices.

The contract was executed by Lorance on March 24, 1992, and by Mr. Philip Eastman as Vice President for SHCH on March 30, 1992. The last act necessary to make the contract binding upon the parties, the execution by Mr. Eastman on behalf of SHCH, occurred in Atlanta, Georgia on March 30, 1992.

Article XV of the agreement specified that any controversy or claim arising out of or relating to the contract, or any breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Article XV further specifies that a judgment upon an award entered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The locale of the arbitration was specified as being Atlanta, Georgia. See, App. 39.

After the agreement was signed, Lorance moved from California to Alabama and began his practice there. SHCH, through Jenkins and its other officers and agents,

continued to perform its obligations under the contract from its principal offices in Atlanta, Georgia. As per the contract, SHCH from Atlanta, Georgia, provided regular assistance to Lorance in the marketing and set up of his practice. It was Jenkins' responsibility as an officer of SHCH to assist Lorance in evaluating the type and quality of medical equipment and supplies that Lorance was to use in the performance of his duties in the medical practice. This assistance was handled by Jenkins primarily from Atlanta, Georgia, by communicating with Lorance both by telephone and by written correspondence mailed to and from Atlanta. These communications and tasks were performed pursuant to SHCH's obligation to provide substantive assistance to Lorance under the agreement in question. Jenkins has attached to his affidavit four examples of written correspondence sent by Lorance to Jenkins and other officers of SHCH to the SHCH corporate offices in Atlanta, Georgia. These letters establish the continuing activities, involvement and efforts of SHCH and its agents conducted in the Atlanta, Georgia offices of SHCH, as called for under the agreement.

As required per the agreement, SHCH forwarded substantial sums of money, exceeding $100,000.00, to Lorance. The money sent to pay Lorance pursuant to the income guaranty was wired from Atlanta, Georgia to Hamilton, Alabama on a regular basis. The payment and transmission of these sums constituted the principal performance required of SHCH' under the contract in question. Without the advancement of funds required under the agreement by SHCH from Atlanta, Georgia to Lorance, SHCH could not have fulfilled its contractual

obligations. It was explained to Lorance that he would be paid his income guaranty in exchange for the services required of him under the agreement from Atlanta, Georgia via direct payment or by wiring funds from SHCH's Atlanta, Georgia account into a Hamilton, Alabama bank to cover the payments in question. Accordingly, Lorance benefitted from over $100,000.00 worth of funds sent across state lines.

In addition to agreeing to the arbitration clause referenced above, which specified that the site of the arbitration hearing would be Atlanta, Georgia, the parties also agreed that the contract would be governed by the laws of the State of Georgia. At the time that Lorance entered into the agreement in question, he specified that all notices and acknowledgements regarding the contract be sent to Southern Health at its corporate offices in Atlanta, Georgia, and that notices to him be sent to 679 Hilltop Drive, Number 51, Redding, California.

On or about January 29, 1993, SHCH notified Lorance that it was exercising its right to terminate the contract between the parties as per the specific provisions of that agreement. SHCH notified Lorance that his contract was being terminated due to his material breach of vacation/CME time off and as a result of his failure to diligently attempt to establish and maintain an economically viable practice. SHCH had the contractual right to terminate Lorance for either of these occurrences pursuant to the termination clause of the agreement, Article IX. As a result of Lorance's breaches of contract, SHCH has made demand on Lorance for repayment of the substantial sums advanced to him by SHCH. Lorance refused to repay any of the monies advanced. The notification of

termination was submitted by Niles B. Floyd on behalf of SHCH to Lorance on January 29, 1993. The letter is attached as Appendix 42-43.

Shortly after being terminated, on March 4, 1993, Lorance filed a civil action in the Circuit Court of Marion County, Alabama. Lorance alleged that SHCH breached the agreement in question in his complaint. SHCH, Jenkins and Floyd filed a motion to dismiss in the Circuit Court of Marion County, Alabama on April 15, 1993. SHCH, Jenkins and Floyd simultaneously made a demand for arbitration pursuant to Article XV of the agreement. The disputes urged by Lorance arose from the contractual duties specified in the agreement. Accordingly, under the agreement, the arbitration of these issues should have been conducted in Atlanta, Georgia. SHCH moved to dismiss the Circuit Court action and urged the enforceability of the arbitration clause of the agreement.

After receiving the demand for arbitration, Lorance filed a Motion to Stay Arbitration with the Circuit Court of Marion County, Alabama. The petitioner submitted his affidavit in support of his Motion to Stay Arbitration based upon Lorance's statement that he did not "contemplate" that the agreement would involve interstate activity and based upon Lorance's position that the agreement in question did not involve "interstate commerce".

Some four months after the Motion to Stay Arbitration was filed, oral argument was conducted. The previously referenced affidavits of Mr. Eastman and Jenkins were submitted in opposition to Lorance's motion to stay arbitration, along with citations of law supporting

SHCH's position that the disputes must be arbitrated in Atlanta, Georgia.

The trial court took the matter under advisement and issued an order on October 15, 1993, in pertinent part holding that the Federal Arbitration Act did apply and determining that the arbitration clause found in the contract between the parties was enforceable. The October 15, 1993 order is appended hereto as App. 9-11.

The parties were assigned an arbitrator, former Georgia State Bar President, Charles T. Lester, Jr. The case proceeded under the American Arbitration Association guidelines in Atlanta, Georgia. Discovery commenced, depositions were taken and an arbitration date was agreed upon and set. Lorance obtained a continuance, over SHCH's objection, and a second arbitration date was scheduled. The parties traded exhibit lists and identified arbitration documents to be used at the hearing, and discovery was substantially completed with the exception of Lorance's deposition, which was scheduled several times, but not taken, due to his alleged inability to appear in Alabama or Georgia for his deposition. He moved out of Alabama shortly after he was terminated by SHCH.

On or about October 29, 1993, just before the arbitration was to have been completed in Atlanta, Georgia, Lorance filed a Petition for Extraordinary Writ of Mandamus with the Supreme Court of Alabama.

On February 11, 1994, the Supreme Court of Alabama granted Lorance's petition for Writ of Mandamus. The February 11, 1994 decision had seven concurring opinions and one dissent by Justice Houston. The decision is

attached as App. 1-8. The Alabama Supreme Court reaffirmed its position that predispute arbitration agreements are unenforceable under Alabama law, Section 8-1-41, Alabama Code 1975. Moreover, the Court reaffirmed its adoption of the test of whether a contract containing an arbitration clause involves interstate commerce is whether the parties to the contract contemplated substantial interstate activity at the time they entered into this contract. *Ex parte Jones*, 628 So.2d 316 (Ala. 1993). This test was identical to the test used by the Alabama Supreme Court in the *Home Buyers Warranty Corporation II, and National Home Insurance Company v. Lopez* case, Case No. 93-995, previously referenced.

In this case, as in the *Home Buyers Warranty Corporation* action, the Alabama Supreme Court has vacated a circuit court's order wherein the circuit court required the parties to adhere to specific arbitration clauses contained within the contracts. In both cases, a majority held the FAA inapplicable, for insufficient involvement of interstate commerce. The Alabama Supreme Court majority reached this deviant result in part because a few weeks before the *Home Buyers Warranty Corporation* decision, on July 16, 1993, the Alabama Supreme Court dramatically reinterpreted the way Section 2 of the FAA applies in Alabama.

Until last summer, contradictory tests for determining the sufficiency of "commerce" for FAA purposes had co-existed in Alabama jurisprudence. Under *Ex parte Costa & Head (Atrium), Ltd.*, 486 So. 2d 1272 (Ala 1986) ("*Costa & Head*"), the FAA was generally interpreted to apply when there was the "slightest nexus" with interstate commerce – reflecting the court's then view that the

FAA was intended to exploit the full reach of the Commerce Clause. On the other hand, in two narrow categories of cases – those involving consumer disputes with automobile dealers and disputes arising out of stock purchase agreements – the court had since 1989 applied a more restrictive test. That was the test formulated in *Ex parte Warren*, 548 So. 2d 157 (Ala.), *cert. denied sub nom Jim Skinner Ford, Inc. v. Warren*, 493 U.S. 998 (1989) ("Warren"), holding that the FAA applied only where the contracting parties were shown at the time of agreement to have subjectively "contemplated substantial interstate activity."[1]

On July 16, 1993, over the objections of Justices Maddox, Adams and Ingram, the Alabama Supreme Court formally overruled *Costa & Head* in favor of Warren. The new, more restrictive reinterpretation was announced in two cases decided that day: *Ex parte Jones*, 628 So. 2d 316 (Ala. 1993); and *Continental Grain Co. v. Beasley*, 628 So. 2d 319 (Ala. 1993).[2] The majority opinion in the present cases

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[1] By its own terms, and as described in later cases, until mid-1993 *Warren* was originally confined to its own "narrow factual context". *Ex parte Brice Building Co.*, 607 So. 2d 132 (Ala. 1992). Indeed, the majority of *Ex parte Jones*, 628 So. 2d 316 (Ala. 1993), admitted that it had "reemphasized" in prior cases that "Warren has a narrow application". And Justice Maddox observed in his *Ex parte Jones* dissent that Warren had in practice only been applied to consumer disputes with auto dealers, and to disputes arising out of stock purchase agreements.

[2] In *Ex parte Jones*, a dispute arising out of a stock purchase agreement, the majority denied arbitration In *Continental Grain*, involving agreements between a foreign corporation and its Georgia division using Alabama Chicken growers to raise poultry for interstate markets, the court found the federal Act applicable even under the new test.

candidly admitted that Warren's "contemplation" test had been chosen because it "better promotes our strong public policy against the use of predispute arbitration agreements."

A few weeks later, the court applied this more restrictive test to deny arbitration to the petitioner in *Home Buyer's Warranty Corp.* Justices Maddox and Adams again dissented.[3] Justice Maddox argued that the court's new subjective "contemplation" test was inconsistent with the FAA's legislative history, and with this Court's decisions in *Southland Corp. v. Keating*, 465 U.S. 1 (1984), *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), and *Perry v. Thomas*, 482 U.S. 483 (1987).

The present case presents similar issues to those raised in four separate cases in which the Alabama Supreme Court, in August, 1993, used the new "contemplation" test to deny specific enforcement of predispute arbitration agreement.[4] In all five cases, the Alabama

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[3] Justice Ingram concurred in the result.

[4] The other four were the *Home Buyer's Warranty Corporation* case, involving a home buyer's warranty issued in 1988 from the warrantor in Colorado to Alabama homeowners. In 1990, the home was purchased by the Lopezs, who were residents of Florida. The Lopezs sued, alleging structural damages, and Home Buyer Warranty Corporation moved to dismiss and/or compel arbitration as per the terms of the arbitration clause in the warranty. In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 628 So. 2d 354 (Ala. 1993), a homeowner deliberately replaced his local termite bond to "go with a national company like Terminix," used a Veterans Administration form, and obtained a bond issued in Tennessee by an Arkansas corporation and guaranteed by a Delaware limited partnership based in Tennessee; and *The Terminix Int. Co. LP v. Jackson*, 628 So. 2d 375

Supreme Court has improperly limited the scope and enforceability of predispute arbitration agreements drafted in conformity with the FAA.

REASONS FOR GRANTING THE WRIT

Section 2 of the FAA declares that written agreements to arbitrate

> in any maritime transaction or a contract evidencing a transaction *involving commerce* . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. [Emphasis supplied]

This statute, reflecting a strong national policy favoring arbitration, was intended to "revers[e] centuries of judicial hostility to arbitration agreements." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974). This Court zealously enforces the statute, "notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Memorial Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24

(Ala. 1993), involving a Delaware limited partnership based in Tennessee, and a termite bond issued by an Arkansas company utilizing a Veterans Administration form and contemplating use of materials brought in from out-of-state; and *Henderson v. Superior Ins. Co.*, 628 So. 2d 365 (Ala. 1993), involving claims under an accident insurance policy issued in Atlanta, Georgia, by a Delaware corporation based in Atlanta with no Alabama office.

Neither of the *Home Buyer's Warranty Corporation* dissenters sat in any of these three cases.

(1983). Since *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967), this Court has eliminated one state-created barrier after another to implementation of the FAA's pro-arbitration policy, and has created a body of federal substantive and procedural law controlling in both federal and state courts – applicable in those cases where the FAA itself applied through Section 2. In the course of developing this body of law, the Court has recognized that Congress intended the FAA to apply "within the full reach of the Commerce Clause." *Perry v. Thomas*, 482 U.S. 483, 490 (1987).

Alabama maintains a contrary state public policy hostile to arbitration. By statute it strictly prohibits enforcement of predispute arbitration agreements, except where federal law preempts.[5] *The Alabama Supreme Court has now created a device to widen the scope of Alabama's anti-arbitration policy at the expense of the federal policy strongly favoring arbitration.* The device is as simple as it is impermissible. Attack the federal policy at its weakest link – that is, cut back the reach of the FAA, and therefore the federal substantive and procedural law inextricably linked to it, by shrinking the meaning of the key jurisdictional phrase "involving commerce." Once the jurisdictional reach of the FAA is shrunk, the body of federal substantive and procedural law developed by this Court in connection with the FAA would only apply to the shrunken number of cases that can satisfy this narrower, and highly subjective, jurisdictional test.

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[5] See App. 44-45.

In Alabama, "involving commerce" no longer means that the FAA applies to any transaction with the "slightest nexus" to interstate commerce, or even to transactions "affecting" commerce. Instead, in Alabama, the FAA now only applies – and predispute arbitration clauses are only specifically enforceable and the related federal law applicable – where the contracting parties are found to have subjectively "contemplated substantial interstate activity" when they agreed to arbitrate. The key in many cases will be personal affidavits from parties seeking to avoid arbitration, or to avoid some aspect of the body of federal law that accompanies the FAA, that they "had not contemplated substantial interstate activity" when they voluntarily entered into contracts containing agreement to arbitrate.[6] In this action, Respondent Lorance filed an affidavit stating that he did not "contemplate" and "was not under the impression" that the agreement would involve activity in or with other states other than Alabama. This subjective allegation flies in the face of the facts that establish that the majority of obligations created under the agreement involved performance by SHCH from Georgia almost exclusively. Despite the weakness of Lorance's skeletal "no contemplation" argument, the Alabama Supreme Court utilized his affidavit to carefully

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[6] Justice Maddox' *Ex parte Jones* dissent (App. 25) noted that commentators in Alabama had criticized the *Warren* test for its "subjectivity" citing Bynam & Pugh, "Enforcing Arbitration Agreements in Alabama: A Double Dilemma," 54 *Alabama Lawyer* 38, 43 (January 1993). The authors wrote: "The *Warren* subjective test encourages the party seeking to avoid arbitration to fabricate, after the fact, his alleged 'state of mind' at the time of contracting to avoid the enforcement of an unambiguous written clause."

side-step the clear body of federal law that supports the Federal policy favoring arbitration.

The decision of the Alabama Supreme Court conflicts with decisions by this Court and by several of the Federal Courts of Appeals. Should the Alabama decision stand, the important federal policy strongly favoring arbitration would have only a stunted application in Alabama and in other states which do not enforce predispute arbitration agreements. Moreover, courts bent on preserving anomalous state limitations upon arbitration would be tempted to use the subjective "contemplation" test in order to limit the scope both of the FAA itself and of the federal substantive and procedural law linked to it.

I. The Alabama Supreme Court's re-interpretation impermissibly restricts the FAA, and therefore the federal substantive and procedural law linked to it, to transactions where the parties subjectively "contemplated substantial interstate activity" – contrary to the intent of Congress as interpreted by this Court.

Southland Corp. v. Keating, 465 U.S., at 16, recognizes that, in creating the FAA, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements." There, the Court confronted a California ban on arbitration of claims brought in state court under a state franchise investment law, on the theory that the FAA did nothing more than create a procedural remedy for cases brought in federal court. This Court gave that position short shrift. In language pertinent here, the Court held that in enacting the FAA:

> Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.

465 U.S., at 14.

In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court held that the FAA preempted provisions of the California Labor Code purporting to exempt wage claims from arbitration. In its decision, Section 2 of the FAA was described, 482 U.S., at 490 as

> a statute that embodies Congress' intent to provide for the enforcement of arbitration agreements *within the full reach of the Commerce Clause.* [Emphasis supplied][7]

As demonstrated by the dissenting opinions in such cases as *Southland, Mercury Construction, Perry* and *Prima Paint*, the FAA's legislative history left room for honest disagreement about aspects of the original intent. These have included whether the FAA applies to state, as well

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[7] This broad interpretation of Section 2 was not casually uttered. To reach its result, the Court had to distinguish its earlier decision in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973). *Ware* had held that the same California Code provisions did not conflict with the federal securities regulatory scheme and were not preempted. The Court distinguished *Ware* on the ground that, unlike the FAA, the federal scheme involved there did not require "nationwide uniformity" of dispute resolution, manifested no intent to require arbitration, and had a narrower jurisdictional base.

as federal, court proceedings; whether important substantive areas regulated by various federal statutes are beyond the reach of the FAA; whether states may carve out substantive areas for exclusion from the FAA; and whether the states may interpose procedural obstacles of their own invention, such as court determination of "fraud in the inducement" defenses. But *Prima Paint* and subsequent cases have settled such disagreements.

Nor should it any longer be open to question that, as this Court held in *Perry*, Section 2 was intended fully to exploit the reach of the Commerce Clause. If *Perry* is correct, enforceability under the FAA, and application of the federal substantive and procedural law linked to it, cannot be restricted to those arbitration agreements where the contracting parties are found to have subjectively "contemplated substantial interstate activity."

The Alabama Supreme Court's decision to the contrary was not based on any examination of the legislative history, or even on analysis of this Court's decisions. Instead, the majority simply chose *Warren's* more restrictive "contemplation" test, which the court had itself always confined to its "narrow factual context," over the more expansive "slightest nexus" test of *Costa & Head*. And it did so precisely because it believes the more restrictive test better accommodates Alabama's public policy against specific enforcement of predispute arbitration agreements. The Alabama Supreme Court's gerrymandering of the facts and law to avoid the FAA's intent, focus and legislative history shows a blatant disregard for the federal substantive and procedural law under the FAA.

In *Warren*, too, the majority had omitted to review either the legislative history or this Court's decisions. Instead, it had lifted language – out of context – from dictum in a concurring opinion in *Metro Industrial Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382 (2d Cir. 1961). *Metro* was an exceedingly easy case, whatever the jurisdictional standard, for it arose out of an agreement made in New York between Connecticut and New Jersey contractors and a New York subcontractor under which the New York sub performed painting services at Homestead Air Force Base in Florida, using out-of-state personnel and materials. Judge Lumbard's concurring opinion addressed the "involving commerce" question, not for the purpose of restricting the reach of the FAA, but to suggest that what mattered was not whether people or goods actually crossed state lines (parties opposing arbitration had argued that all the painting work was in fact performed in one Florida county), but whether the agreement on its face "evidences interstate traffic." 287 F.2d, at 387.[8]

North Carolina's Supreme Court, which sometimes relies on Judge Lumbard's "contemplation" language, does so not to further an anti-arbitration policy, but to *broaden* the reach of the FAA and rebut arguments that it does not apply, e.g., where contractual performance was exclusively in-state. See *Burke County Public Schools Bd of Ed v. Shaver Partnership*, 303 N.C. 408, 279 S.E.2d 816, 818-19 and n.8 (1981), where a lower court had perversely

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[8] Indeed, Judge Lumbard observed the arbitration agreement in *Metro* was, in any event, enforceable under New York state law, as well as under the FAA. 287 F.2d, at 388 n.3.

read *Prima Paint* to require "actual physical interstate shipment of goods." The state supreme court cited *Metro* as one of several cases applying the FAA despite the fact that the contracted-for performance was entirely local.[9]

In short, the Alabama Court has stood *Metro* on its head, using dictum in a concurring opinion in an easy case – language intended to repel an attack on the FAA – as a device to broaden the reach of Alabama's own anti-arbitration policy at the expense of the FAA and the federal body of law linked to it.

II. The Alabama Supreme Court's re-interpretation of Section 2 conflicts with decisions of the federal Courts of Appeals

The Alabama Supreme Court's decision that "involving commerce" requires that the parties subjectively "contemplated substantial interstate activity" conflicts with decisions by several of the federal Courts of Appeals.

The leading case is *Snyder v. Smith*, 736 F.2d 409, 417-18 (7th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1985).

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[9] *Burke County* involved a repealed, but arguably still applicable North Carolina statute interpreted, despite ostensibly favorable language, to forbid specific enforcement of predispute arbitration agreements. A new statute, effective August 1, 1973, made such agreements specifically enforceable. 279 S.E.2d, at 818 n.5.

See also, Bennish v. North Carolina Dance Theater, Inc., 108 N.C. App. 42, 422 S.E.2d 335 (N.C. Ct. of App. 1992), where the court emphasized North Carolina's present pro-arbitration policy, and cited the Lumbard language to make clear that the FAA applies to personal service contracts.

Snyder involved a partnership whose sole function was to own real property in Harris County, Texas, but whose partners all lived in Illinois when the partnership was formed. At issue was a dispute over the price to be paid for a deceased partner's interest. Appellant unsuccessfully argued that it was not enough to show that the transaction "affected commerce," and disputed the sufficiency of "any casual and sporadic activities in which the partnership engaged." On these facts, the appellate court found the FAA applicable. It noted that *Prima Paint* had declined to limit the FAA to interstate shipment of goods, as the losing party there had argued. And it construed *Southland's* statement that "involving commerce" was not a limitation on the statute but a "qualification" as "suggest[ing] that Congress intended the [FAA] to apply to all contracts that it constitutionally could regulate." 736 F.2d, at 418.[10]

In the Fifth Circuit, the FAA applies to all contracts "relating to interstate commerce." The Court of Appeals so held in *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243-44 (5th Cir. 1986), citing the legislative history, *Prima Paint*, and *Snyder*. At issue was a take-or-pay contract over royalty gas owned by the State of Louisiana, produced in Louisiana by Mesa, and transported and sold to customers entirely in Louisiana. It was sufficient to invoke the FAA that Mesa partners lived in Texas, and sometimes traveled to and otherwise communicated with Louisiana. In *Del E. Webb*

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[10] Back in 1986, when the Alabama Supreme Court fashioned its own "slightest nexus" test, it relied explicitly on *Snyder*. *Costa & Head*, 486 So. 2d, at 1275.

Constr. v. Richardson Hosp. Authority, 823 F.2d 145, 147-48 (5th Cir. 1987), the Court of Appeals not only followed *Mesa*, but expressly rejected an argument that for FAA purposes the interstate commerce must be "substantial." *Webb* arose out of a construction dispute where all the construction was in Texas, Webb maintained an office in Texas to run the project, and issued all payroll checks in Texas. The court found it sufficient that employees and construction materials crossed state lines, and that the mails were used.

The Alabama Supreme Court decision also conflicts with the Tenth Circuit's decision in *Foster v. Turley*, 808 F.2d 38, 40-41 (10th Cir. 1986), arising out of an agreement to purchase half of a New Mexico mine. The buyer Foster lived in Oregon, on at least one occasion sent trucks to New Mexico, proceeds were sent to him in Oregon, and the mine's products were sometimes milled and sold outside of New Mexico. The court had no difficulty on these facts. And it, too, held that "involving commerce" is to be construed as "coextensive with congressional power to regulate under the Commerce Clause," in reliance on *Prima Paint* and *Snyder*. 808 F.2d, at 40.[11]

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[11] In a slightly different context, the Sixth Circuit has likewise concluded that Section 2 "was meant to extend the applicability of the Act and its exclusions to the scope of Congress' power under the Commerce Clause . . . " *Willis v. Dean Witter Reynolds*, 948 F.2d 305, 310 (6th Cir. 1991).

III. The Alabama Supreme Court's decision shrinking the FAA's reach in Alabama, and excluding a wide range of transactions intended to be covered, threatens to marginalize the important body of federal substantive and procedural law under the FAA

The decision sought to be reviewed is no fluke. For it represents a deliberate effort to shrink the reach of the FAA, and will inevitably curtail application, in Alabama and many other states, of the body of federal substantive and procedural law which this Court has developed since *Prima Paint*.

In many jurisdictions, the FAA is interpreted to require specific enforcement of predispute arbitration agreements, and therefore compliance with this Court's FAA-related decisions – in all transactions where the fullest reach of the Commerce Clause justifies its application. But in Alabama, the FAA now applies only where the courts find that the contracting parties subjectively "contemplated substantial interstate activity."

Among the immediate consequences of the new test, and we needn't speculate because they are already reflected in a half-dozen Alabama Supreme Court decisions, are these:

1. The FAA, and this Court's FAA-related decisions, no longer apply in Alabama to home buyers warranties issued by out-of-state companies with no local presence – even where the home buyer negotiates to buy his or her new home from outside the state, uses means of interstate commerce to facilitate the purchase, files claims as required in offices outside the state, and receives claims

information from out-of-state. *Lopez v. Home Buyers Warranty Corp., supra.*

2. The FAA, and this Court's FAA-related decisions, no longer apply in Alabama to termite bonds issued by out-of-state national companies with no local presence – even where the owner deliberately replaces a local bond with a national one, uses a Veterans Administration form, and has the home inspected by persons traveling from out-of-state and who use out-of-state materials. *Terminix Int. Co. LP v. Jackson, supra,* and *Allied-Bruce Terminix Companies, Inc. v. Dobson, supra.*

3. The FAA, and this Court's FAA-related decisions, no longer apply in Alabama to claims arising out of accident insurance policies issued by out-of-state companies with no local presence, so long as the insured deals with a local agent. *Henderson v. Superior Ins. Co., supra.*

4. The FAA, and this Court's FAA-related decisions, no longer apply in Alabama to claims against dealers selling cars manufactured out-of-state and subject to a whole panoply of federal regulation – even where the parties have agreed in writing "That the motor vehicle described in this sale document has been heretofore traveling in interstate commerce and has an impact upon interstate commerce," so long as the party opposing arbitration asserts, contrary to the written agreement, that "substantial interstate activity" was not "contemplated." *Ex parte Warren,* 548 So.2d, at 158.[12]

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[12] Justice Maddox, dissenting, wrote that he "cannot make a distinction between a contract to buy stock [held subject to the

Indeed, *Warren* and *Henderson* together suggest the court's intention to limit the FAA only to the most obviously interstate transactions between commercial businesses like the ones in *Continental Grain*, excluding from its reach all transactions between Alabama *consumers*, on the one hand, and local merchants, agents and other businessmen – regardless whether the transactions have a nexus with, or relate to or affect interstate commerce. There is no basis in the legislative history, or this Court's decisions, for such a restrictive view of the FAA.

5. Except in obvious cases like *Continental Grain*, all that it may take in Alabama to avoid the FAA and this Court's FAA-related decisions is a boiler-plate affidavit asserting the *subjective* proposition that the affiant "did not contemplate substantial interstate activity" when voluntarily agreeing to arbitrate future disputes. See, e.g., *Henderson v. Superior Ins. Co.*, *supra*, where such an affidavit was accorded significant weight.[13]

One by one, this Court has eliminated substantive and procedural obstacles raised by states to the pro-arbitration policy reflected in the FAA. The Court has, for example, rejected contentions that the FAA, and the federal substantive and procedural law linked to it, only

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FAA in prior Alabama decisions] and a contract to buy an automobile." *Ex parte Warren*, 548 So. 2d, at 161.

[13] The Alabama decision invites costly and time-consuming peripheral litigation over the truth of such subjective statements, as well as over the "substantiality" of the interstate activity involved. This Court has pointed out that a "core purpose" of the FAA was to avoid such costly delays. *Southland*, 460 U.S., at 7-8

apply in federal court, that they have no application in the face of the federal scheme regulating securities or state schemes regulating wage claims, that they don't apply to international antitrust claims or to certain age discrimination claims, that certain kinds of disputes are not really suited to arbitration and are better left to the courts, and that the FAA only applies to transactions involving physical shipment of goods across state lines.

The Court has always recognized the special importance of policing how the FAA is treated in state courts, since the vast bulk of litigation arguably subject to the statute takes place in the state courts. The Alabama Supreme Court's attempt to shrink the reach of the FAA represents, therefore, a serious threat to the objectives which led Congress to enact the FAA and this Court to police its enforcement.

The most immediate victims of this deviant re-interpretation are the parties to the wide range of transactions which now seem to be excluded from the FAA in Alabama. These include transactions involving home buyer warranties, termite bonds, accident insurance policies, and the purchase of consumer goods including automobiles so long as local dealers and agents are used.

This more restrictive jurisdictional test is likely to spread not only to states like Mississippi and Nebraska with public policies hostile to arbitration agreements, but also to the many states whose own laws carve out categories of disputes from arbitration, or interpose various procedural hurdles to arbitration. This Court has been vigilant not to permit the FAA to be whittled away by

such state-created hazards. But where restrictive and subjective interpretations of "involving commerce" render the FAA inapplicable, these state hazards will come in through the back door.

Once free of FAA compulsion, even those states whose own laws do enforce predispute arbitration agreements will regain the right under state law to carve out exceptions. Courts everywhere will now be free – in cases found to be outside the newly restricted jurisdiction of the FAA – to declare that wage claims, franchise disputes, or state RICO claims are not suitable for arbitration. And they will regain the right to interpose such procedural obstacles as court adjudication of "fraud-in-the inducement" defenses, the right of parties unilaterally to revoke their agreements to arbitrate, extraordinary requirements that arbitration clauses must be signed by the parties' counsel and not by the parties alone, unusual rules for determining when the right to arbitrate has been waived, and special rules governing the remedies allowable through arbitration. These are obstacles to arbitration which would not, or might not, be tolerated where the FAA does apply.

In short, the Alabama Supreme Court's re-interpretation of "involving commerce" threatens to unravel much of what this Court's FAA decisions have accomplished since *Prima Paint*.

CONCLUSION

The Alabama Supreme Court has deliberately chosen to shrink "involving commerce", in order to promote the state's anti-arbitration policy at the expense of the national policy strongly favoring arbitration. Its restructive re-interpretation is inconsistent with the intent of Congress, as interpreted by this Court and the Federal Courts of Appeals. "Involving commerce" now means one think in Alabama, something else in the Federal Courts of Appeals and many other states. As a result, decades of this Court's FAA-related decisions are threatened to be marginalized even in states whose own laws enforce predispute arbitration agreements.

The facts supporting this petition are clear and convincing. The agreement involved numerous activities and transactions in Georgia, Alabama and California. The contract was negotiated between the parties while located in California and Georgia. The last act binding the parties occurred in Georgia when SHCH signed the agreement at its offices in Atlanta, Georgia. Moreover, over $100,000.00 in funds were advanced by the Petitioners from Atlanta, Georgia to Lorance in Alabama as per the terms of the agreement. The parties chose Georgia law to be the controlling law and contracted to arbitrate all disputes arising under the agreement in Atlanta, Georgia, which is SHCH's principal place of business.

Unless this Court takes a stand against Alabama's renegade decisions which attempt to gut this Court's FAA decisions and federal pro-arbitration policy, the intent of the Congress and of this Court will be irreparably

undermined and impugned. This is an area where the Court's guidance is urgently needed.

Respectfully submitted,

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May 12, 1994

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SUPREME COURT OF ALABAMA

OCTOBER TERM, 1993-94

1930140

Ex Parte Thomas A. Lorance, M.D.
PETITION FOR WRIT OF MANDAMUS
(Re: Thomas A. Lorance, M.D.

v.

Southern Health Corporation of Hamilton, Inc., et al.)

(Marion Circuit Court, CV-93-57)

(Released Feb. 11, 1994)

PER CURIAM.

The plaintiff, Thomas A. Lorance, M.D., petitions this Court for a writ of mandamus directing Judge Bobby R. Aderholt of the Marion County Circuit Court to set aside an order compelling arbitration of tort and breach-of-contract claims brought by Lorance against Southern Health Corporation of Hamilton, Inc. ("Southern Health"); Niles v. Floyd, vice president of Southern

Health; and Frank Jenkins, M.D.[1] The issue is whether the arbitration clause in the professional services contract entered into by Lorance and Southern Health is enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA").

Predispute arbitration agreements are unenforceable under Alabama law, § 8-1-41, Alabama Code 1975; *Wells v. Mobile County Bd. of Realtors, Inc.*, 387 So. 2d 140 (Ala. 1980); however, if an arbitration clause is contained in a contract that involves interstate commerce, then the FAA preempts state law, and the clause is enforceable. *Ex parte Alabama Oxygen Co.*, 433 So. 2d 1158, *vacated, York Int'l v. Alabama Oxygen Co.*, 465 U. S. 1016, 104 S. Ct. 1260, 79 L. Ed. 2d 668 (1983); *Terminix Int'l Co. Ltd. Partnership v. Jackson*, [Ms. 1911842, August 13, 1993] ___ So. 2d ___ (Ala. 1993). The FAA makes certain arbitration clauses enforceable:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable."

9 U.S.C. § 2. " 'The FAA applies to a transaction within this state if the contract [1] involves interstate commerce and [2] contains an arbitration clause voluntarily entered into by the parties.' " *Lopez v. Home Buyers Warranty Corp.*, [Ms. 1920330, August 20, 1993] ___ So. 2d ___ (Ala. 1993) (quoting *A. J. Taft Coal Co. v. Randolph*, 602 So. 2d 395, 397

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[1] Jenkins is apparently an officer of Southern Health, although the petition does not indicate his title.

(Ala. 1992)). The test of whether a contract containing an arbitration clause involves interstate commerce is whether the parties to the contract contemplated substantial interstate activity at the time they entered into the contract. *Ex parte Jones,* [Ms. 1920249, July 16, 1993] ___ So. 2d ___ (Ala. 1993).

In March 1992, Lorance and Southern Health entered into a "Net Income Guarantee Agreement," under which Lorance agreed to establish a medical practice in Hamilton, Alabama, in exchange for Southern Health's promise to help Lorance establish his practice and to subsidize his net practice income during the term of the contract by paying him $15,000 per month. This contract contained an arbitration clause, which required that all claims or controversies arising out of or relating to the contract be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association and that the arbitration be conducted in Atlanta, Georgia.

Southern Health is a Georgia corporation with its corporate offices in Atlanta, Georgia. Southern Health's officers, G. Frank Jenkins, M.D., president; Phillip H. Eastman III, vice president/secretary; Mike Hall, executive vice president; and Susan Jennings negotiated the Net Income Guaranty Agreement from Southern Health's corporate offices in Atlanta, Georgia; Lorance at that time was residing in California. According to the affidavits of Jenkins and Eastman, the final act making the contract enforceable was Eastman's execution of the contract in Atlanta.

In its written order, the circuit court held that Lorance and Southern Health contemplated substantial interstate activity in the performance of the contract, noting that when the contract was negotiated, Lorance was a California resident and Southern Health was a Georgia corporation; that the negotiations took place, and the contract was executed, outside Alabama; that the income guarantee payments to Lorance by Southern Health originated in Atlanta, Georgia; and that Lorance and agents of Southern Health communicated numerous times concerning the establishment of Lorance's practice, e.g., they communicated in regard to marketing, medical equipment, and supplies.

Citing *First Real Estate Corp. v. Brown Marx Tower Limited Partnership*, 620 So. 2d 648 (Ala. 1993). Lorance argues that the circuit court erred in compelling arbitration and that, notwithstanding the communications between the parties across state lines during the negotiation of the contract, the purpose or "focus" of the contract was to subsidize and assist Lorance in establishing a medical, surgical practice in Hamilton, Alabama. Therefore, Lorance contends, the activity that the parties contemplated was purely local.

Citing *Continental Grain Co. v. Beasley*, 628 So. 2d 319 (Ala. 1993), Southern Health, Jenkins, and Floyd counter, arguing that it is the scope of the contract, not the *locus actus* – place of performance – that determines the applicability of the FAA. Therefore, they say that, because the contract was negotiated while neither party to the contract was a resident of Alabama and because Southern Health's performance under the contract was directed

from its corporate offices in Atlanta, Georgia, the contract involved substantial interstate activity.

In *First Real Estate Corp., supra,* the issue was whether a commercial real estate management agreement involved interstate commerce for purposes of applying the FAA. First Real Estate Corporation of Alabama, Inc., an Alabama corporation, entered into separate management agreements with Brown Marx Tower Limited Partnership (a limited partnership organized under the laws of New York) and Bell Building Group, Inc. (an Alabama corporation with its principal place of business in New York), for the management of Brown Marx Tower in Birmingham, Alabama, and the Bell Building in Montgomery, Alabama. Under these management agreements, which were negotiated in Alabama, First Real Estate was to manage the Brown Marx Tower and the Bell Building. Brown Marx Tower Limited Partnership and the Bell Building Group brought an action against First Real Estate, alleging fraud, breach of contract, breach of fiduciary duty, gross negligence, and tortious interference with business relations. All of these allegations concerned actions or events that occurred in Alabama and that arose from obligations that were to be performed solely in Alabama. Holding that the management agreements did not involve interstate commerce, the Court stated that the "mere use of the telephone and mail by persons in different states to communicate about activity that is purely local is too slight to constitute such a nexus." 620 So. 2d at 649.

Although the contract in this case was not negotiated in Alabama, the holding in *First Real Estate Corp.* persuades us that the communications between the parties

during both the negotiation of the contract and its performance concerned an activity that was purely local, namely, the establishment of a surgical practice in Hamilton, Alabama. We hold, therefore, that these communications do not, by themselves, support an inference that the parties contemplated substantial interstate activity when they entered into the "Net Income Guarantee Agreement." Like the service contracts in *First Real Estate Corp.*, which were entered into by companies either organized or having their principal place of business in another state, for the management of commercial real estate located in Birmingham and Montgomery, Alabama, the professional service agreement in this case was entered into for the purpose of establishing a surgical practice in Hamilton, Alabama. Although the parties to the agreements in *First Real Estate Corp.* and the parties to the agreement in this case engaged in communications across state lines, the activity toward which their contracts and their efforts were directed was purely local.

Southern Health contends that the parties contemplated substantial interstate activity and that this contention is supported by evidence indicating that Southern Health's agents, working in Atlanta, Georgia, directed that corporation's performance under the contract. We conclude that *Continental Grain Co. v. Beasley, supra,* does not support Southern Health's argument. *Continental Grain Co.* involved an arbitration agreement between Continental Grain Company (a poultry products retailer) and a group of Alabama chicken growers. Although the growers' performance under the contract consisted solely of growing chickens in Alabama during the period between hatching and processing, the Court held that the

parties had contemplated substantial interstate activity in performing their contractual obligations because they were engaged in the production of poultry, 90 percent of which was to be sold out of state in interstate commerce.

Southern Health relies heavily on this Court's statement in *Continental Grain Co.* that the place of performance under the contract is not dispositive and that it is the "scope of the contract," and not the *locus actus*, that determines the applicability of the FAA. The Court in *Continental Grain Co.* made it clear that although the growers' performance under the contract occurred solely in Alabama, their performance under the contract was but one part of a larger production process that contemplated the ultimate sale of 90 percent of the poultry in interstate commerce. Therefore, the *Continental Grain Co.* Court concluded, the scope of the contract encompassed substantial interstate activity. In this case, however, although some of Southern Health's performance under the contract was directed by its agents from Atlanta, Georgia, the scope of the Net Income Guarantee Agreement was not so extensive as to include substantial interstate activity. The scope of the contract consisted principally of establishing a medical practice in Hamilton, Alabama, to provide surgical services mainly to Alabamians in Marion County.

Based on the foregoing, we hold that the circuit court erred in compelling arbitration of Lorance's claims against Southern Health under the Net Income Guaranty Agreement. Therefore, the petitioner is entitled to the writ.

WRIT GRANTED.

Hornsby, C. J., and Almon, Shores, Steagall, Kennedy, Ingram, and Cook, JJ., concur.

Houston, J., dissents.

Ex parte Thomas A. Lorance. M.D.

HOUSTON, JUSTICE (dissenting).

I would deny the writ. *Continental Grain Co. v. Beasley*, 628 So.2d 319 (Ala. 1993).

THOMAS A. LORANCE, M.D., an individual, Plaintiff VS. SOUTHERN HEALTH CORPORATION OF HAMILTON, INC., a Georgia corporation, et al., Defendants	)	IN THE CIRCUIT COURT FOR MARION COUNTY, ALABAMA CIVIL ACTION NUMBER CV-93-57

ORDER

(Filed Oct. 20, 1993)

This cause having come on to be heard before this Court upon the Plaintiff's Motion to Stay Arbitration and upon the Defendant's Motion to Dismiss and now in consideration of the same it is,

ORDERED, ADJUDGED AND DECREE as follows, to-wit:

1. This Court, upon consideration of the affidavits filed by the various parties and the argument and briefs submitted by the parties, finds that the Plaintiff's Motion to Stay Arbitration is due to be denied based upon the Federal Arbitration Act, 9 U.S.C.A. Section et. seq. as interpreted by the Alabama Supreme Court in *Ex parte Warren*, 548 So.2d 157, and related cases interpreting the *Warren* standard.

2. This Court is satisfied from the evidence presented to it that, in fact, a written contract calling for arbitration was entered into by the parties and that the

parties "contemplated substantial interstate activity in the performance of the contract." *Ex parte Warren*, 548 So.2d 157, 160.

3. The examples of interstate commerce between these parties included the fact that the contract itself, was negotiated between Dr. Lorance, a California resident and Southern Health Corporation of Hamilton, Inc., a Georgia Corporation. The negotiations and execution of this contract appear to have occurred outside the State of Alabama with the last binding act to the contract occurring in Atlanta, Georgia.

4. Dr. Lorance was aware that his income would be supported via payments from Georgia by Southern Health and, in fact, the income guarantee paid by Southern Health to Dr. Lorance came through Georgia.

5. It would appear from the evidence presented to this Court that Dr. Jenkins and other employees of Southern Health, in fact, engaged in interstate commerce as regards their performance obligations under this contract with Dr. Lorance, who was practicing medicine in Hamilton, Alabama. Information was exchanged between the parties between Hamilton and Georgia regarding matters involving Dr. Jenkin's responsibility for assisting Dr. Lorance in the "marketing and the setup of his practice." This assistance also involved the evaluating and choice of medical equipment and supplies to be used by Dr. Lorance in his practice. Numerous telephone conversations were conducted between Dr. Lorance in Hamilton, Alabama and Dr. Frank Jenkins in Atlanta, Georgia. It

appears from the evidence that telephone calls were initiated by both parties for the purpose of discussing the performance of their contract.

6. Because this Court finds that the Federal Arbitration Act applies in this case, this State's law condemning arbitration agreements is preempted and, therefore, the arbitration clause found in the contract between the Plaintiff, Dr. Thomas A. Lorance, and the Defendant, Southern Health Corporation of Hamilton, Inc., is enforceable. See *Continental Grain Company, Inc., et al. v. Beasley, et al.*, 2 ALW 9-6, ___ So.2d ___ 1993.

DONE this the 15th day of October, 1993.

/s/ Illegible
Judge

STATE OF GEORGIA
COUNTY OF FULTON

AFFIDAVIT OF G. FRANKLIN JENKINS

1.

My name is G. Franklin Jenkins. I am a defendant in the lawsuit styled Thomas A. Lorance, M.D. versus Southern Health Corporation of Hamilton, Inc. ("Corporation") et. al. pending in Circuit Court for Marion County, Alabama.

2.

I am over 18 years old and mentally competent to state the facts contained herein. The information contained herein is based on my personal knowledge.

3.

On March 30, 1992, the Corporation entered into a Net Income Guarantee Agreement with Thomas A. Lorance, M.D. ("Agreement").

4.

As part of the obligations under the Agreement, I, as President of the Corporation, was responsible for the performance of certain obligations on behalf of the Corporation.

5.

In particular, I held numerous conversations with Dr. Lorance via telephone from my office in Atlanta, Georgia.

On occasions I would call Dr. Lorance and at other times Dr. Lorance would call me in Atlanta, Georgia. These conversations with Dr. Lorance occurred while Dr. Lorance was in both Hamilton, Alabama and California, Dr. Lorance's previous residence.

6.

I, as well as other officers of the Corporation, would receive correspondence from Dr. Lorance in Atlanta, Georgia. The information delivered by Dr. Lorance to us was pursuant to his obligations under the Agreement and pursuant to the Corporation's obligations under the Agreement (See Exhibits A, B, C, and D).

7.

The purpose for the communication referenced above, both written and verbal, was to assist Dr. Lorance in the marketing and the set-up of his practice. As I am familiar with medical equipment and the needs of physicians and their practices, it was my responsibility, as an officer of the Corporation, to assist Dr. Lorance in evaluating the type and quantity of medical equipment and supplies to be utilized in the performance of his duties in the practice. The verbal and written communication between Dr. Lorance and myself, as well as other officers of the Corporation, was for the sole purpose of evaluating Dr. Lorance's needs for medical equipment and supplies as required under the Agreement.

8.

Virtually all of the communication, both written and verbal, with Dr. Lorance, whether with myself or other officers of the Corporation, occurred in Atlanta, Georgia.

9.

Dr. Lorance was aware of my personal residence and the Corporation's residence in Atlanta, Georgia and knew that for the Corporation to fulfill its obligations under the Agreement, Dr. Lorance would need to communicate with Atlanta, Georgia on a regular basis with myself, and others, on behalf of the Corporation,

Affiant sayeth not.

/s/ Dr. G. Franklin Jenkins
Dr. G. Franklin Jenkins

STATE OF GEORGIA
COUNTY OF FULTON

Sworn and subscribed before me
this 25th day of August, 1993.

/s/ Illegible
Notary Public

My notary expires July 9, 1994

[seal]

Thomas A. Lorance, M.D.
1325 Military St. South
Hamilton, AL 35570
Phone: (205) 921-7464
Fax: 921-7141

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* Vascular
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* Duodenum
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* Colon

September 1, 1992

Mike Hall
Executive Vice President
Southern Health Corporation
5605 Glenridge Drive
Suite 960
Atlanta, Georgia 30342

RE: Endotech laparoscopic equipment reference letter

I spoke with Dr. Bill Viar, who is the Chief of Surgery at AMI Brookwood Medical Center in Birmingham today, September 1, 1992. I asked him specifically about the laparoscopic set-up from Endotech and they use MP video as their camera. Dr. Viar said that MP video is the best camera he has seen. He has had the opportunity to see many systems because he teaches courses and he goes into many hospitals to proctor people. He stated that MP video is the best and that is the camera that he uses.

I asked him about John Frazier, the Rep for Endotech and he says that he is reliable, he is a good guy and he

recommends him. He states that he does give good service to his product.

If there are any questions, you can speak to Dr. Bill Viar yourself at 205-871-1920.

Sincerely Yours,

/s/ Thomas A. Lorance
Thomas A. Lorance, M.D.
Dept. of Surgery
Marion County General Hospital

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1325 Military St. South
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SURGERY
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* Trauma
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* Vascular
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ENDOSCOPY
UPPER
* Esophagus
* Stomach
* Duodenum
LOWER
* Colon

September 1, 1992

Philip Eastman
Executive Vice President
Southern Health Corporation
5605 Glenridge Drive
Suite 960
Atlanta, Georgia 30342

RE: Endotech laparoscopic equipment reference letter

I spoke with Dr. Bill Viar, who is the Chief of Surgery at AMI Brookwood Medical Center in Birmingham today, September 1, 1992. I asked him specifically about the laparoscopic set-up from Endotech and they use MP video as their camera. Dr. Viar said that MP video is the best camera he has seen. He has had the opportunity to see many systems because he teaches courses and he goes into many hospitals to proctor people. He stated that MP video is the best and that is the camera that he uses.

I asked him about John Frazier, the Rep for Endotech and he says that he is reliable, he is a good guy and he

recommends him. He states that he does give good service to his product.

If there are any questions, you can speak to Dr. Bill Viar yourself at 205-871-1920.

Sincerely Yours,

/s/ Thomas A. Lorance
Thomas A. Lorance, M.D.
Dept. of Surgery
Marion County General Hospital

Thomas Lorance, M.D.
1315 Military Street South
Box 399
Hamilton, Alabama 35570

MEMORANDUM

TO: Philip Eastman,
Executive Vice President
Southern Health Corporation
5605 Glenridge Drive
Suite 960
Atlanta, Georgia 30342

FROM: Dr. Thomas Lorance
General Surgeon
Marion County General Hospital
Hamilton, Alabama 35570

DATE: August 20, 1992

SUBJECT: Justification for OR table.

Prior approval has already been given for purchase of a manual OR table. When we were ready to place this order we found that this table did not have xray capability. I understand that in order to have a table that has xray capability the cost will be about $3,000 more. Despite this added cost, I consider xray capability as an indispensable quality needed for OR tables. Frequently xrays have to be done while an operation is underway and without any xray capability it is extremely difficult with a prepped and draped patient. I hope there can be a speedy approval of this expenditure for the OR table.

Procedures that come to mind in which xrays are likely are:

1.) Cholangiograms (during cholecystectomy).

2.) Placement of pacemakers.

3.) Placement of indwelling catheters.

4.) Stat chest needed during surgery, abdominal xray needed for a missing needle or sponge.

5.) Intraoperative IVP.

To name a few.

Thank you for your consideration.

App. 21

Thomas Lorance, M.D.
1315 Military Street South
Box 399
Hamilton, Alabama 35570

MEMORANDUM

TO: Frank Jenkins, M.D.
President
Southern Health Corporation
5605 Glenridge Drive
Suite 960
Atlanta, Georgia 30342

FROM: Thomas Lorance, M.D.
General Surgeon TA
Marion County General Hospital
Hamilton, Alabama 35570

DATE: August 20, 1992

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To name a few.

Thank you for your consideration.

THOMAS A. LORANCE, M.D., Plaintiff, v. SOUTHERN HEALTH CORPORATION OF HAMILTON, INC., a Georgia corporation, et al., Defendants.	)	IN THE CIRCUIT COURT FOR MARION COUNTY, ALABAMA CIVIL ACTION NUMBER CV-93-57

COUNTY OF FULTON

STATE OF GEORGIA

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

COMES NOW, PHILIP H. EASTMAN, III, who swears and attests to the following in aid of the Defendants' Motion to Dismiss as follows:

1.

My name is Philip H. Eastman, III, and over 18 years of age and competent to provide this affidavit, under oath, based upon my own personal knowledge and experience. I am a resident of the state of Georgia.

2.

I am an officer of Southern Health Corporation of Hamilton, Inc. Southern Health Corporation of Hamilton, Inc. (hereinafter "SHCH") is a Georgia corporation.

3.

I signed the Net Income Guaranty Agreement which is the subject contract on behalf of SHCH on March 30, 1992.

4.

This contract is the contract at issue in the above styled case.

5.

The last binding act to make the contract enforceable against the parties was my signature. My execution of the contract on behalf of SHCH occurred in Atlanta, Georgia on March 30, 1992.

6.

Dr. Lorance signed the contract in question on March 24, 1992. I do not know exactly where Dr. Lorance was at the time he signed the contract, but he signed the contract in question before I did and before his move to Hamilton, Alabama.

7.

From Georgia, Dr. Franklin Jenkins, Mike Hall, Susan Jennings and I negotiated the terms of the contract in question while he was residing in California.

8.

At all relevant times through the negotiation time frame and through the time that Dr. Lorance and SHCH

entered into the contract in question, SHCH was a Georgia corporation with offices and officers in Atlanta, Georgia.

9.

Dr. Lorance was aware of the fact that SHCH was a Georgia corporation and he telephoned us here in Georgia and he discussed the performance of the contract in question with us while we were in Atlanta, Georgia. In fact, Dr. Lorances' first contact with us concerning his services was via his recruitment firm in Texas. Our first direct contact with Dr. Lorance was via telephone at our offices in Atlanta, Georgia.

10.

Under the terms of the agreement, SHCH agreed to provide funds and income assistance to Dr. Lorance contingent upon his performance of specified duties and his compliance with the conditions of income assistance.

11.

Dr. Lorance knew that he would be receiving said income assistance from Georgia by and through the Georgia corporation in the event of his full compliance.

12.

We discussed and required that Dr. Lorance perform certain services in Alabama. However, it was also discussed and required that we as a Georgia corporation pay

Dr. Lorance for his services performed by or through our Georgia offices in Atlanta, Georgia.

13.

Dr. Lorance was well aware of the fact that all of our performance obligations under the contract would require performance from Georgia, thereby involving interstate commerce.

14.

Moreover, the Article XV of the contract dealing with arbitration in Atlanta, Georgia was a negotiated term of the agreement. Since we were a Georgia corporation who would be performing under the contract from Atlanta, Georgia, and since our offices and officers had both their corporate address and personal residences in Atlanta, Georgia, it was decided by all parties that Atlanta, Georgia would be the proper place to determine any controversies or claims arising out of or relating to this contract through the arbitration process in Atlanta, Georgia.

15.

It was clearly and explicitly contemplated that our contract would involve substantial interstate activity. The contract in actuality did involve interstate activity as we provided income assistance to Dr. Lorance from or through Georgia in amount exceeding $100,000.00.

16.

Dr. Lorance failed to perform as required under the contract in question and the funds paid by the Georgia corporation to Dr. Lorance should be returned to SHCH in Georgia as contemplated within the contract in the event of a breach or default by Dr. Lorance.

17.

The contract itself also contemplated other instances where activities were required involving Georgia. For example, notices were to be sent to my attention concerning the automatic renewals and written acknowledgement specified within the contract at our corporate offices, at 5605 Glenridge Drive, Suite 960, Atlanta, Georgia 30342.

18.

At the time of the negotiation of the contract, Dr. Lorance was living in California. He contemplated that notices would be sent to him as specified within Article III of the contract at 679 Hilltop Drive, Number 51, Redding, California 96003. Dr. Lorance has never changed his address for notice purposes from the California address.

19.

Also, it was within the contemplation of the parties at the time of the execution of the agreement in question that the agreement shall be governed by the laws of the

state of Georgia as to interpretation, jurisdiction, construction and performance. This is set forth in Article XII of the contract.

Further, Affiant sayeth not.

This 17th day of June, 1993

/s/ Philip H. Eastman
Philip H. Eastman, III

Sworn to and subscribed
before me, this 17th day
of June , 1993.

/s/ Illegible
Notary Public
My commission Expires: July 9, 1994

NET INCOME GUARANTEE AGREEMENT
(Filed March 4, 1993)

This agreement ("Agreement") made this 30th day of March, 1992, by and between Thomas A. Lorance, M.D. ("Physician") and Southern Health Corporation of Hamilton, Inc., (the "Company").

WITNESSETH:

WHEREAS, Physician is a Doctor of Medicine having received his Medical Degree from Ohio State University College of Medicine located in Columbus, Ohio; and

WHEREAS, Physician is licensed or will be licensed to practice medicine in Alabama; and

WHEREAS, Physician desires to establish a private medical practice in Hamilton, Alabama, and Company agrees to assist Physician in establishing a private medical practice (the "Practice"):

NOW, THEREFORE, in consideration of the terms, conditions, covenants, agreements and obligations herein stated, it is now mutually agreed by and between the parties hereto as follows:

ARTICLE I
Income Assistance

Income Assistance will commence on May 1, 1992, or such time as Physician establishes a medical office Practice in Hamilton, Alabama ("Commencement Date"), however, in no event shall Physician commence his medical Practice later than June 1, 1992, without the written approval of Company.

Company will subsidize the Net Practice Income of Physician during the term of Agreement. "Net Practice Income" is defined as gross collections minus reasonable professional expenses (any expense the Internal Revenue Service (IRS) considers as allowable business operating expense for Federal Income Tax purposes. It does not include expenditures of a personal nature, personal income taxes, and/or retirement/deferred compensation plans). Net Practice Income will be computed on a cash basis. "Subsidy" payments will be made each calendar month to equal the shortfall between monthly Net Practice Income and the "Monthly Net Guarantee." The Monthly Net Guarantee is the Net Practice Income guarantee to the Physician on a monthly basis, which equals Fifteen thousand dollars and zero cents ($15,000.00) per full calendar month, not to exceed a total of One Hundred eighty thousand dollars and zero cents ($180,000.00) in any consecutive twelve (12) month period. Subsidy may be prorated in consideration of partial months.

ARTICLE II
Conditions of Income Assistance

The aforementioned Monthly Net Guarantee will remain in effect under the following conditions:

(1) Physician shall provide full-time medical care and treatment to members of the public a minimum of (40) hours per week, a minimum of five (5) days per week, and a minimum of forty-eight (48) weeks per year. Office hours shall be conducted during daytime business hours so that a Parctice may be developed. "On-call" evening and weekend hours shall not be considered in the computation of the minimum 40

hours per week requirement. Physician shall maintain reasonable hours so that a Practice can be developed.

(2) The untaking of the Company pursuant to this Agreement, and the responsibility of Company to remit to the Physician the Monthly Net Guarantee shall be reduced by collections received by the Physician from any source, whether institutional or corporate, or from private practice of medicine during the month.

(3) Physician hereby covenants and agrees to furnish and make available to Company a reporting of the Practice by the tenth (10th) day following the prior calendar month ended until such time as Physician has repaid all Subsidy advances. The report shall consist of: gross billings, gross collections, professional expenses, computations of Net Practice Income to determine payments due Company by Physician or payments due Physician by Company, records of deposits to the account of Physician at his banking institution(s), office visits, and hospital visits.

(4) Physician hereby agrees to authorize the Company to conduct an audit of Practice's books/records during normal business hours whenever the Company deems the procedure is warranted.

(5) Physician agrees to bill within ten (10) days of rendered services and will make attempts to collect receivables as expediently as possible. As long as the Subsidy balance exists, the Company in its sole discretion will perform these billing functions or elect to contract with a billing service affiliated with the Company at reasonable cost to Practice, on behalf of the Physician.

(6) Physician shall establish a full-time practice in Hamilton, Alabama.

(7) Physician agrees to provide Emergency Room "on-call" coverage in accordance with the Marion County General Hospital's medical staff bylaws.

Payment of Subsidy from Company to Physician shall occur within five (5) days of receipt of reporting from Physician, outlined in (3), above.

ARTICLE III
Term of Income Assistance

Company hereby agrees to provide and Physician agrees to accept, the assistance defined in this Agreement for a period of twelve (12) months from the Commencement Date, however, in no event shall said payments commence prior to Physician commencing his office practice in Hamilton, Alabama (the "Initial Term"). This Agreement shall automatically renew at each twelve (12) month anniversary of this Agreement (for twelve (12) consecutive months upon the written agreement between both the Physician and Company delivered to the respective parties at the addresses contained below. This procedure of written acknowledgement shall be required for each anniversary renewal:

PHYSICIAN	COMPANY
Thomas A. Lorance, M.D. 679 Hilltop Drive, #51 Redding, California 96003	Philip H. Eastman, III, Vice President/Secretary Southern Health Corporation of Hamilton, Inc. 5806 Glenridge Drive, Suite 960 Atlanta, Georgia 30342-38851

ARTICLE IV
Insurable Interest

The parties hereby agree that the Company holds an insurable interest in the Physician. In the event the Company secures a life and disability insurance policy insuring the Physician in the name of the Company, the Physician agrees to cooperate in the insurance application process, including but not limited to, seeking a physical examination. The premiums for the insurance policy shall be considered an expense of the Practice until such time as the Subsidy is repaid.

ARTICLE V
Vacation and C.M.E. Time-off

The Physician is granted three (3) weeks paid time-off annually for vacation and one (1) week for continuing medical education, said times not to run consecutively. It is understood that Physician will not utilize either vacation or continuing medical education time off during the first six months of practice in Hamilton, Alabama, with the exception of a two-week period scheduled during June-July 1992.

ARTICLE VI
Non-Compete

In consideration of Company's assistance in establishing Physician's practice in Hamilton, Alabama, Physician agrees not to establish a medical practice within a fifty (50) mile radius of Hamilton, Alabama, for a one (1) year period following the termination or expiration of this

Agreement. This section shall survive the termination or expiration of this Agreement.

ARTICLE VII
Practice Set-Up Assistance

Company hereby agrees to assist Physician in organizing/setting up Physician's office, ordering supplies, hiring personnel, setting up accounting records and marketing and promoting Physician's practice, upon request by Physician and in any event, any promotion efforts be consistent with the current medical ethics as practiced in the State of Alabama.

ARTICLE VIII
Moving Expenses

Reasonable moving expenses incurred by the Physician and his family will be reimbursed by the Company in conformance with the provisions of this Agreement. All reimbursement for travel expenses shall be in conformance with the Internal Revenue Service guidelines. Unless otherwise provided herein, reimbursable expenses are limited to expenses associated with moving Physician's personal, professional, and office belongings and travel, meals and lodging expenses incurred during the move to Physician's new residence. This is not construed to include house-hunting trips and expenses, etc., but the one-time travel to Hamilton, Alabama. Company will reimburse Physician based upon the lowest bid of three (3) estimates, with acceptance of the lowest bid contingent upon mutual agreement by Company and Physician

in advance of the move. It is also understood that Physician will move his personal belongings and family to Marion County, Alabama, within three (3) months of Physician's commencement of practice in Hamilton, Alabama.

ARTICLE IX
Termination

Notwithstanding any other provisions contained herein, the Company may elect to terminate its obligations set forth in this Agreement, upon the occurrence of any of the following events:

(a) Physician fails to obtain a Alabama State Medical License prior to June 1, 1992, or said license is revoked or suspended by the State of Alabama.

(b) Physician's medical staff privileges at Marion County General Hospital or Lamar Regional Hospital are terminated in accordance with medical staff bylaws.

(c) Physician's professional liability insurance is canceled.

(d) Physician's application for medical staff at Marion County General Hospital or Lamar Regional Hospital is denied for whatever reason.

(e) Material breach of this Agreement by Physician.

(f) Physician does not diligently attempt to establish and maintain an economically viable practice in Hamilton, Alabama, as determined in the sole discretion of the Company.

(g) Death or long-term disability (defined as an inability to work for sixty (60) consecutive days) of Physician.

(h) 90 days following written notice to Physician for reasons other than cause.

Should this Agreement be terminated because of any reason, except for material breach by Company, or death or long-term disability of Physician, Physician will be required to repay Company within three (3) months of notice of termination the sum of all funds advanced by Company in excess of Net Practice Income, including but not limited to, Subsidy and all other items paid on Physician's behalf including cash collections, Practice set-up expenses, rent, etc., excluding major capital equipment that becomes Company property.

Should this Agreement be terminated because of death or long-term disability of Physician. Physician or his estate will assign all interest in Accounts Receivable generated during the term of this Agreement to Company, in consideration of the Subsidy and all other items paid for on Physician's behalf by the Company during the term of this Agreement.

Physician may elect to terminate his obligation contained herein upon the failure of the Company to meet its material obligations as set forth in this Agreement.

Election to terminate this Agreement by either party must be made in writing and delivered to the respective party at the address contained herein:

ARTICLE X
Professional Liability Insurance

Physician shall furnish to Company proof of insurance. Said policy shall cover professional liability in a minimum amount of One Million Dollars ($1,000,000) per claim/Three Million Dollars ($3,000,000) aggregrate. Physician shall furnish to Company evidence that the premium on said policy is prepaid and that said policy is in full force and effect. Further, Physician shall notify his insurance company that if said policy is cancelled for any reason, notice of cancellation shall be provided by insurance company to Company. Company will assist Physician financially and otherwise in securing medical malpractice insurance.

ARTICLE XI
Independent Contractor

It is expressly understood and agreed that Physician is an independent contractor expected and entitled to freely and independently exercise his judgment in accordance with good medical practice in the care and treatment of his patients. Physician shall exercise his skill, learning, intelligence, and experience in the evaluation, diagnosis, medication, treatment, and hospitalization of his patients according to his informed judgment, and shall not be constrained in the exercises of his independent judgment by the terms or conditions of this Agreement.

ARTICLE XII
Admissions Disclaimer

It is expressly understood and agreed that while Marion County General Hospital ("MCGH") and Lamar Regional Hospital ("LRH"), intend to serve the needs of patients of the Physician, the Physician is permitted to use his professional judgment when deciding whether or not to admit his patients to MCGH or LRH. During the term of this Agreement, Physician agrees to maintain active staff privileges at both MCGH and LRH.

ARTICLE XIII
Governing Law

This Agreement shall be governed by the laws of the State of Georgia as to interpretation, jurisdiction, construction, and performance.

ARTICLE XIV
Assignment

Physician shall not assign, sell or transfer this Agreement or any interest therein without the consent of Company, except that assignment to a professional corporation or association in which Physician is sole or majority shareholder shall be allowed without such consent. Company may assign this Agreement to any affiliated entity.

ARTICLE XV
Arbitration

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules

of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The locale of the arbitration shall be Atlanta, Georgia.

ARTICLE XVI
Covenants and Conditions

This Agreement shall be binding upon and inure to the benefit of the parties hereof and their respective successors and assigns.

ARTICLE XVII
Invalid Provision

The invalidity or unenforceability of a particular provision of this Agreement shall not affect the other provisions hereof, and the Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted.

ARTICLE XVII
Government Access to Records

Until the expiration of four (4) years after the furnishing of any services pursuant to this Agreement and to the extent, if any, required by applicable law or regulation. Physician shall make available upon written request to the Secretary of Health and Human Services, or upon request to the Comptroller General, or any of their duly authorized representatives, this Agreement and books, documents, and records of Physician that are necessary to certify the nature and extent of costs. If Physician enters

into any subcontract with a related organization. Physician shall require in such subcontract that the subcontractor also agree to these same requirements.

ARTICLE XIX
Entire Agreement

This Agreement constitutes the entire understanding between the parties and contains all of the covenants made between them with respect to the subject matter hereof, and it supersedes any and all other agreements between the parties, either oral or in writing.

ARTICLE XX
Amendments

This Agreement may be revoked, amended, changed, or modified only by a written amendment executed by the Company and Physician. No waiver of any provisions of this Agreement shall be valid unless in writing signed by the obligated party.

ARTICLE XXI
Agreement Rescission

Company in its sole discretion, may rescind this Agreement in the event Physician does not return a fully executed copy of this Agreement to the Company by March 31, 1992, 5:00 p.m., Eastern Standard Time.

ARTICLE XXII
Sick Leave/Health Insurance

Physician shall be permitted twelve (12) days sick leave on an annual basis. In the event Physician is ill or injured

in excess of 12 days, the Company in its sole discretion may adjust the Physicians Net Practice Income to account for the non-productive time of the Physician due to illness/injury.

The parties agree that the Company is not obligated to provide health insurance to the Physician, or his family, through independent or Company sponsored health plans.

In **WITNESS WHEREOF**, the parties have executed this agreement in multiple origins.

BY: PHYSICIAN

/s/ Thomas A. Lorance
Thomas A. Lorance, M.D.

Date: March 24, '92

WITNESS:

/s/ Charlotte Holcombe
(Signature)

/s/ Charlotte Holcombe
(Print)

Date: 3/24/92

FOR: COMPANY

By: /s/ Illegible

Its: /s/ Vice President

Date: 3/30/92

/s/ Jane Webb
(Signature)

/s/ Jane Webb
(Print)

Date: 3/30/92

EXHIBIT B
(March 4, 1993)

EXHIBIT B

SOUTHERN HEALTH CORPORATION

1315 Military Street, Route 6 Box 14

Hamilton, Alabama 35570

(205) 921-7861

(Filed March 4, 1993)

January 29, 1993

Thomas Lorance, M.D.
P.O. Box 399
Hamilton, Alabama 35570

RE: Net Income Guarantee Agreement

Dear Dr. Lorance:

On numerous occasions we have attempted to assist you in the development of your practice. As we have indicated, your involvement in the community and the establishment of a good working relationship with established practitioners is critical to the success of your practice. Unfortunately, your practice management style has not be conducive to the development of a small town practice. As a result we do not believe you have diligently attempted to establish and maintain an economically viable practice.

In addition, you have utilized vacation/CME time off which is in excess of the amounts authorized in your contract. We do not believe your practice, or any new practice, will ever develop with a significant amount of time off.

For these reasons, and others, we believe it would be in our mutual best interest to terminate our contract effective immediately. Although we are exercising our right to terminate your contract due to both your material breach of vacation/CME time off and your failure to diligently attempt to establish and maintain an economically viable practice in Hamilton, we are willing to work with you amicably in resolving issues including your cessation of practice in Hamilton and repayment of amounts advanced under the contract.

Please contract us at your earliest convenience to resolve these issues.

Sincerely,

SOUTHERN HEALTH CORPORATION OF HAMILTON, INC.

/s/ Niles V. Floyd
Niles V. Floyd
Vice President

9 USCS § 1

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

(July 30, 1947, ch 392, § 1, 61 Stat. 670.)

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract transaction, or refusal, shall be

valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

(July 30, 1947, ch 392, § 1, 61 Stat. 670.)

Code of Alabama 1975

§ 8-1-41. Obligations which cannot be specifically enforced.

The following obligations cannot be specifically enforced:

* * *

(3) An agreement to submit a controversy to arbitration;

* * *